THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2006-0708, State of New Hampshire v. Oliver Hooper, the court on October 19, 2007, issued the following order:

The defendant, Oliver Hooper, appeals his convictions for two counts of criminal threatening, two counts of aggravated felonious sexual assault, one count of kidnapping, two counts of simple assault and one count of sexual assault. He argues that the trial court erred in: (1) limiting cross-examination of the State's expert witness; (2) allowing the State to call expert witnesses without full disclosure within the discovery deadlines; (3) denying his motion to suppress; and (4) allowing the State to introduce evidence of the defendant's other bad acts. We affirm.

The admissibility of evidence is generally within the trial court's sound discretion. State v. Morrill, 154 N.H. 547, 550 (2006). Because the trial court is in the best position to gauge the prejudicial impact of particular testimony, we will not upset its ruling absent an unsustainable exercise of discretion. Id.

The defendant argues that the trial court's decision to exclude evidence of the victim's prior sexual conduct violated his rights under the State and Federal Constitutions. Although he cites his right to present all favorable proofs under Part I, Article 15 of the State Constitution, and his rights to due process and fair trial under the Fifth Amendment and his right to confrontation under the Sixth Amendment to the Federal Constitution, he presents no developed argument to support his claim that his rights to due process and fair trial were violated. We therefore do not consider them. See State v. Blackmer, 149 N.H. 47, 49 (2003) (passing reference to constitutional claim renders argument waived).

The defendant contends that because the State elicited misleading expert testimony and conclusions, he was deprived "of a rational conclusion consistent with innocence"; namely, "that the absence of his DNA was due to lack of penetration and/or innocence." See State v. Morrill, 154 N.H. 547, 549-51 (2006) (explaining distinction between "curative admissibility" and "specific contradiction" under "opening the door" doctrine). To the extent that any ambiguity may have existed, the State clarified through its expert in sexual assault cases that there was no evidence that the defendant had ejaculated in the victim's vagina. Accordingly, we find no merit in the defendant's contention.

Having concluded that the testimony elicited by the State was not misleading, we next consider whether the evidence that the defendant sought to

present was otherwise admissible. See State v. White, 155 N.H. 119, 125 (2007). Although the defendant argues that the exclusion of the evidence violated his right to produce all favorable proofs under Part I, Article 15 of the State Constitution, the right to produce all favorable proofs gives a defendant only the right to produce witnesses, not to produce specific testimony, State v. Graf, 143 N.H. 294, 296 (1999). It therefore provides no support for the defendant's claim of error in this case.

We turn to the defendant's argument that his rights to confrontation and cross-examination were violated. Though fundamental, a defendant's right to cross-examine prosecution witnesses is not unfettered. State v. Spaulding, 147 N.H. 583, 588 (2002). While a trial court may not completely deny a defendant the right to cross-examine a witness, it possesses broad discretion to limit the scope of examination on improper matters of inquiry. Id.

RSA 632-A:6, II (2007) provides that evidence of prior consensual activity between the victim and any person other than the defendant is inadmissible in sexual assault cases. This protection must yield in those limited cases where a defendant demonstrates that the evidence is relevant and that its probative value outweighs its prejudicial effect on the victim. State v. Higgins, 149 N.H. 290, 295 (2003). The defendant has failed to meet his burden in this case because: (1) the State was instructed by the court to make clear through testimony that the victim had not asserted that the defendant ever ejaculated inside her vagina; and (2) the victim testified that she believed that the defendant had ejaculated in her throat but did not testify that he ejaculated in her vagina, and further testified that when she advised him that she was not on birth control he told her "I won't go inside you then" and subsequently removed his penis from her vagina.

The defendant next contends that the trial court erred in allowing the State to call expert witnesses "who were allowed to testify to conclusions without giving the factual underpinnings for those conclusions and without allowing the defense adequate opportunities to prepare to confront the evidence."

We accord considerable deference to a trial court's discovery and evidentiary rulings and will reverse only if a defendant demonstrates that the trial court's decision was clearly unreasonable and to the prejudice of his case. State v. Belton, 150 N.H. 741, 745 (2004).

The defendant cites the testimony of the expert with special training in sexual assault cases whose testimony we have already addressed and the testimony of a forensic expert who testified about shoeprints and a fingerprint found at the scene of the assault. In the hearing on his motion and again in his brief, the defendant argues that the testimony of the experts was without

full factual predicates or evidentiary foundation. As the trial court correctly noted in its order, these defects were the proper subject of cross-examination and went to the weight to be given to the evidence rather than its admissibility.

The defendant also contends that the trial court erred in denying his motion to suppress the search warrant. Assuming without deciding that the defendant has adequately briefed this issue, we find no error. The search was conducted in Maine under a search warrant authorized by a Maine court. The trial court found that the search began before 9 p.m. when the lead police officer climbed through the defendant's window and announced her presence. The defendant does not contest this finding. See Me. R. Crim. P. 41(h) ("Maine daytime search warrant must be executed between the hours of 7 a.m. and 9 p.m., unless the judge . . . authorizes its execution at another time."); State v. Sargent, 875 A.2d 125, 127-28 (Me. 2005) (search conducted under daytime search warrant valid when begun in daylight even though it extends into night); see also State v. Valenzuela, 130 N.H. 175, 196 (1987).

Finally, the defendant argues that the trial court erred in admitting evidence of his other bad acts. The trial court found that: (1) the alleged acts in question did not constitute either alleged bad acts or criminal conduct; (2) there was clear proof that the defendant had committed the alleged acts; and (3) the probative value was not substantially outweighed by its prejudice. Because the record supports these findings, we find no error. See State v. Ayer, 154 N.H. 500, 512 (2006).

Affirmed.

DALIANIS, DUGGAN and GALWAY, JJ., concurred.

Eileen Fox,
Clerk